Center for Children & the Courts

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JUDGE ARNOLD D. ROSENFIELD NAMED 'JUVENILE COURT JUDGE OF THE YEAR'

Each year, juvenile court judges from across the state bestow the honor of "Juvenile Court Judge of the Year" on one of their esteemed colleagues. This year's award was presented during the 1999 California Juvenile Law and Procedure Institute, which was organized by the Center for Judicial Education and Research and sponsored by the Judicial Council and the California Judges Association. The conference was held April 15–17 in Manhattan Beach, California, and this year's recipient was Judge Arnold D. Rosenfield of the Superior Court of Sonoma County.

Judge Rosenfield was elected a judicial officer in 1984 for a term commencing in 1985. He has served most of his tenure in juvenile court, hearing both dependency and delinquency matters. He is a member of the California Judges Association and the Judicial Council's Family and Juvenile Law Advisory Committee, which he chaired from 1991 to 1993. A former member of the Senate's Task Force on Family Law Courts, he is known for his commitment to and compassion for children and families in California.

Judge Rosenfield is an active member of his community. He co-founded the Redwood Children's Center, an organization that assists local authorities in the investigation of allegations of child abuse and neglect. He introduced to Sonoma County the Court-Appointed Special Advocate (CASA) program, which provides volunteers from the community to act as advocates for children who appear before the juvenile court. Judge Rosenfield, a member of the Board of Directors of Social Advocates for Youth, is also involved with Jewish Children and Family Services and the Parent Education Project of Sonoma County.

SIX MONTHS FROM WHEN?

By Gary C. Seiser

According to Welfare and Institutions Code[1] section 366.21(e), the 6-month review hearing for children in out-of-home care is to be held 6 months from the date of the disposition hearing. But according to section 361.5(a)(2), services are presumptively limited to 6 months from the date the child entered foster care in cases in which the child was under the age of three years at the time of initial removal. That date is defined as the date of the jurisdiction hearing or 60 days from the date on which the child was removed from the physical custody of the parent, whichever occurs first.[2] So which date is the date to be used for the 6-month review hearing in cases involving young children? Well, it depends.

To answer that question, we need first to understand this is not an issue involving federal law. Although Professor Michael Wald wrote more than 20 years ago that, for children under three years of age, services should be limited to 6 months,[3] only two states have actually acted on this rule: California and Mississippi.[4] Federal law makes no distinction regarding services based on the age of the child. Nor does

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Six Months From When?

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federal law dictate that the 6-month review hearing be held 6 months from the date the child entered foster care. It mandates only that the permanency hearing be held no more than 12 months from that date.[5] Thus, this is strictly a California question.

A general rule of statutory construction is that when the Legislature makes a change in one section but does not make the same change in another similar section, it evidences an intent to leave the law as it is where not amended.[6] Thus, since the Legislature changed the date of the 12-month review to 12 months from the date the child entered foster care but left the date of the 6-month review as 6 months from disposition, that latter date should control.[7] This is consistent with another rule of statutory construction, that if the statute is clear, as is section 366.21(e), the "plain meaning" rule applies, and the Legislature is presumed to have meant what it said.[8] Some disagree, however, contending that the statutes have to be read as a whole and harmonized to make them consistent.[9] They maintain that the statutes should be interpreted as requiring a review 6 months from the date the child entered foster care for children under three years of age and 6 months from disposition for older children. Both arguments have merit.

In all likelihood, the Legislature didn't think it made a difference. And it shouldn't. If cases are heard according to the timelines established by statute, the disposition hearing will be held within 60 days of the detention hearing,[10] and hence the date for the 6-month review hearing will be essentially the same under either interpretation. This should be happening in the vast majority of cases.

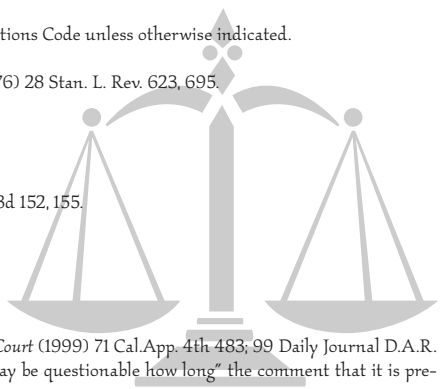
For those cases in which disposition is heard beyond the 60-day time limit, the question becomes more difficult, and the appropriate answer may actually vary from case to case. If reunification services are not denied at disposition,[11] they are to be provided in all cases.[12] Thus, it may be helpful in determining when to hold the 6-month review hearing in a particular case involving children under three to ask at what point 6 months of services have been offered or provided. Such services are supposed to be ordered by the court at the detention hearing.[13] This is true even if the social services agency envisions asking for no services at disposition. But the reality is that many courts don't make that order, many agencies don't provide those services prior to disposition, and many parents' attorneys advise their clients not to utilize such services before adjudication. Thus, in many cases, setting the review hearing for 6 months from the date the child entered foster care virtually ensures that young children and their families will get significantly less than 6 months of services. This is not the intent of the Legislature.[14]

Thus, the easiest way to ensure that young children and their families get 6 months of services is to set the review in all cases 6 months from disposition as provided in section 366.21(e). This is probably the most correct and safest approach. Where, however, the court actually makes the required order for services at detention and the agency actually offers or provides those services immediately, courts may wish to take a different position. In those cases, setting the review 6 months from the date the child entered foster care still results in 6 months of reunification services for the child and family. Courts using this approach should advise all parties at the detention hearing of this intent and make findings at disposition that services were ordered at detention and that reasonable reunification services were offered or provided by the agency thereafter. Was this compromise intended by the Legislature? Probably not. But it's a reasonable approach.

Regardless of which view one takes, the issue may well become moot on January 1, 2000, when legislation being written to resolve this controversy is likely to become law.[15] Until that time, we must all be aware that the pendulum of the dependency system should not be allowed to swing too far in either direction. Helping ensure that young children and their families receive 6 months of reunification services before the 6-month review is one way of achieving the balance in our system that children and families need.

Gary C. Seiser is Senior Deputy County Counsel with the San Diego County Counsel's Office and co-author of *California Juvenile Courts: Practice and Procedure* (San Francisco: Matthew Bender, 1999). The views expressed are his own.

[1] All statutory references are to the California Welfare and Institutions Code unless otherwise indicated.
[2] § 361.5(a).
[3] See Wald, *State Intervention on Behalf of "Neglected" Children* (1976) 28 Stan. L. Rev. 623, 695.
[4] See Miss. Code 43-15-13(1).
[5] 42 U.S.C.A. § 675(5)(C).
[6] See *Estate of McDill* (1975) 14 Cal.3d 831, 837–839.
[7] Compare § 366.21(f) with § 366.21(e).
[8] See *Great Lakes Properties, Inc. v. City of El Segundo* (1977) 19 Cal.3d 152, 155.
[9] See, e.g., *In re Clifford C.* (1997) 15 Cal.4th 1085, 1092–1093.
[10] § 352(b).
[11] § 361.5(b) and (e).
[12] § 361.5(a).
[13] § 319.
[14] But see the recent decision of *Riverside County DPSS v. Superior Court* (1999) 71 Cal.App. 4th 483; 99 Daily Journal D.A.R. 3635, 3637, fn. 9, noting that in light of changes in the law "it may be questionable how long" the comment that it is presumed parents will receive reunification services will "hold up."
[15] See Senate Bill 1226 (Johannessen), introduced February 26, 1999, as amended May 18, 1999.



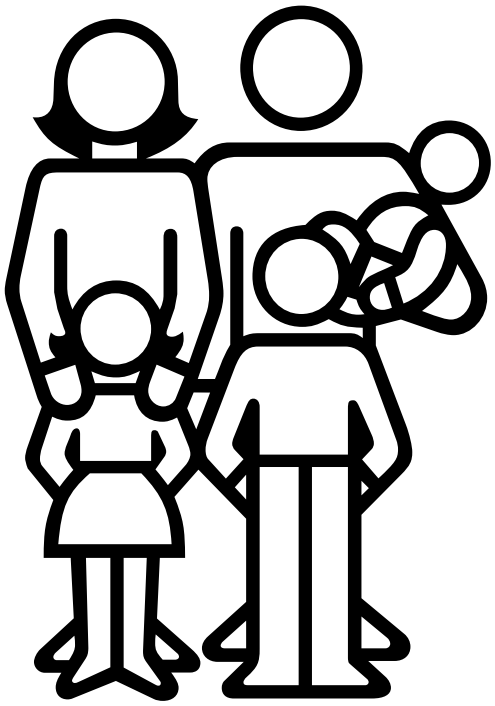
YOLO COURT FUND MEETS CHILDREN'S NEEDS

By Marian Walker

The Family Court Children's Fund was created in 1998 by Superior Court of Yolo County Judge Donna M. Petre with a $10,000 award from the National Foundation for the Improvement of Justice in Atlanta, Georgia. The foundation honored Judge Petre for her establishment of a low-cost supervised visitation program on the grounds of the Seventh-Day Adventist Church in Woodland for children in families with drug, alcohol, or domestic violence issues.

The superior court already had a very active attorneys-for-children program in which attorneys regularly donate hundreds of hours of free legal services to meet the needs of children appearing in the court. The attorneys are routinely appointed in cases involving neglect, abuse, domestic violence, delinquency, dependency, high-conflict divorces, and/or guardianships. In the course of the representation of the children, the court became aware of the problems that many of the children in these homes face on a daily basis. The court realized that there was no fund that would allow the attorneys to provide for a child's emergency need, enhance the quality of life for the child, or simply bring a child an unexpected happiness. The attorneys would tell the court of their clients who did not have a bed, a toy, or the fee to play on the soccer team. Awareness of these wants led Judge Petre to conclude that the best use of the award funds would be to establish a Family Court Children's Fund.

A committee was formed of the two co-presiding judges of the unified family court, Judge Petre and Judge Thomas Edward Warriner; Court Administrator Yolande E. Williams; Court Special Projects Administrator Marian Walker; Family Bar Association President Larry Hoppin; and a member of the community, Judith Moores, who was involved in meeting the needs of low-income families in the county. While the committee was establishing the form, procedures, and policies for the project, the executive director for the county Court-Appointed Special Advocate (CASA) program contacted Judge Petre about placing a $15,000 educational grant received from a local business into the fund. The committee accepted the CASA donation and added the executive director to the committee.



The response to the Family Court Children's Fund has been amazing. The Davis Police Department contacted the committee and donated $1,000. The Sheriff's Department plans to at least match this amount. Judge Warriner's son Jason, a graphic artist in New York, designed the fund's logo free of charge. The county auditor/controller has volunteered her time as a private citizen to audit the funds. The board of supervisors agreed to maintain the fund, cut the checks, and disperse the funds without charge. Additional funds were recently obtained through the clerks of the court, the Justice Joggers, who joined a Human Race Walk to raise money for the fund. A local beauty shop has provided free haircuts, and a local art shop has donated summer art camps for the children.

The fund is intended to make small donations of no more than $250 per child. The court has received its first requests for the funds. An elementary school child requests a bike and helmet through his attorney. Both of his parents are on disability. The mother, a domestic violence victim, is a quadriplegic as a result of her failed suicide attempt. The child is with her 50 percent of the time and would like to join in activities with the other neighborhood kids. In another case, a 14-year-old girl has done all the cleaning and food preparation for her family since her mother left the home. The attorney for the child has requested a donation of a gift certificate for a shopping trip and haircut to show appreciation for this girl's extraordinary contribution to her father and younger siblings during the difficult transition in their home.

To keep the fund solvent, the court is actively seeking out additional funding sources from foundations and grants. The Family Court Children's Fund began dispersing funds on June 1, 1999. To our knowledge, the Family Court Children's Fund is the first to be established by any court in California.

Marian Walker is Court Special Projects Administrator of the Superior Court of California, County of Yolo.

Dependency Case Summaries

Cases Current Through April 1, 1999

In re Sergio C. **(1999) 70 Cal.App.4th 957 [83 Cal.Rptr.2d 51]. Court of Appeal, Second District, Division 1.**

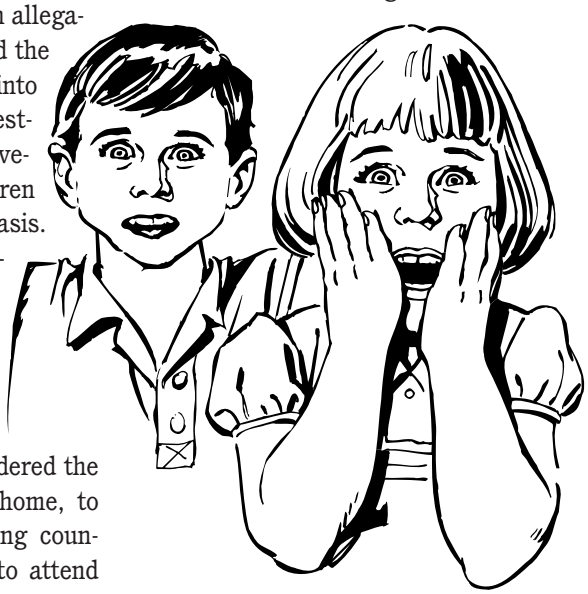
After a mother abandoned her two children and the Department of Children and Family Services (DCFS) located the father of the older child, the juvenile court sustained a petition. The children had originally come under the jurisdiction of the court after the mother severely abused the younger child. The petition alleged that the whereabouts of the other child's father were unknown. After DCFS returned the children to the mother, she left them with a relative and was allegedly using drugs. The relative located Sergio's father. The father picked up Sergio and called DCFS to report the abandonment; the father stated to DCFS that he wanted to care for his son. When the mother was located, she alleged that the father had a history of arrest and drug use. When the father was interviewed, he admitted past misdemeanor arrests but denied any drug use or sales. DCFS filed a supplemental petition. The father complied with all orders of the juvenile court and enrolled in domestic violence counseling. The petition as to the father was sustained based on his history of convictions. The father appealed.

The Court of Appeal reversed the father's sustained petition and the order requiring the father to submit to regular drug tests. The court found that there was insufficient proof of a history of prior convictions; therefore, the petition should not have been sustained. Further, the court found that there was insufficient evidence of drug use by the father, the only evidence being the mother's unsworn and unconfirmed allegation. Although the appellate court agreed with DCFS that the juvenile court has broad discretion to make orders for the well-being of the child, the appellate court found that this discretion did not extend to drug testing based solely on the unreliable testimony of the mother. The court found that where, as here, the custodial parent denies involvement with drugs and has otherwise cooperated with court orders, DCFS must investigate in order to justify the intrusion into the father's life.

In re Joel T. **(1999) 70 Cal.App.4th 263 [82 Cal.Rptr.2d 538]. Court of Appeal, Third District.**

The juvenile court denied a mother further services and placed her five children in long-term foster care. Eighteen months before, the juvenile court had held an initial hearing based on allegations that the mother permitted the father of the youngest child into her home although he had molested the other children. The juvenile court had placed the children with the mother on a trial basis. Later, at a combined jurisdictional and dispositional hearing, the juvenile court had adjudged the children dependents and allowed the children to remain in the custody of their mother. The court had ordered the mother to maintain a stable home, to participate in services including counseling and drug testing, and to attend parenting classes. A year later, pursuant to a supplemental petition to modify the children's placement, the children were removed from the mother's custody because she allowed the father of the youngest child into her home on several occasions in violation of a court order. At the combined 18-month hearing, the juvenile court denied reunification services because it found that 18 months of reunification services had already been provided to the mother.

The mother appealed, claiming that she had not received reunification services but rather family maintenance services since the children were not taken from her custody. She claimed she was therefore entitled to reunification services. The Court of Appeal agreed with the mother, finding that she had not received reunification services and that she should, unless it was shown on remand that there was an applicable exception. The court made a distinction between services offered when a child is placed in the home and services offered when a child is removed from custody. When a child is placed in the home, there is no rule or statute that limits the time during which services may be offered; yet when the child is placed outside the home, the services must be terminated at the end of 18 months. The court reasoned that, although the distinction



was subtle, it was important because the time-limited services aim to reunify a family and the other type of services aim to maintain the family. The court found that once the children were removed from her custody, the mother was entitled to 18 months of time-limited services designed to reunify her family unless there was an applicable exception to her receiving those services.

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***In re Jasmine C.* (1999) 70 Cal.App.4th 71 [82 Cal.Rptr.2d 493]. Court of Appeal, Third District.**

At the conclusion of a dispositional hearing, the juvenile court denied reunification services to a mother for three of her children pursuant to Welfare and Institutions Code section 361.5(b)(10) and (b)(12). The mother had been referred to the Department of Health and Human Services (DHHS) six times prior to the referral of this case. The referrals were made because of the mother's extensive use of drugs while caring for the siblings of the children involved in this case. As a result of some of these referrals, the mother failed to reunify with those siblings, for whom a permanent plan of adoption had been implemented. At the time of this proceeding, the mother was incarcerated for narcotics and carjacking.

The mother appealed, claiming there was insufficient evidence to support the denial of reunification services pursuant to subdivisions (b)(10) and (b)(12) and that she is entitled to reunification services as an incarcerated parent pursuant

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Working to Understand and Deal With Juvenile Offenders

By Patricia E. Lee

The year 1999 marks the 100th anniversary of the official founding in the United States of a separate justice system for juveniles, but nagging questions about the structure, necessity, and efficacy of the present system remain unanswered. Every new high-school tragedy forces America's lawmakers to look more closely at what is happening and what can be done to prevent further tragedies. But we cannot afford to wait for another Columbine High School shooting to accelerate our efforts.

The Research Network on Adolescent Development and Juvenile Justice was established in 1997 by the John D. and Catherine T. MacArthur Foundation to develop a new knowledge base and new solutions for serving the complex needs of our "at-risk" youth. The Network's interdisciplinary agency bridges research, policy, and practice. Two sets of concerns guide current activities of the Network:

1. Analysis of the competence and culpability of adolescents, with respect to the understanding and assessment of adolescents' capabilities that do and could or should influence the treatment of young people in the juvenile and criminal justice systems.
2. Examination of the psychological development of juvenile offenders, with respect to the understanding and assessment of factors that influence the short- and long-term behavior, development, and mental health of young people in the juvenile or criminal justice systems.

To stimulate debate and knowledge of these issues, the Network has sponsored the development of two interdisciplinary volumes, both to be published by the University of Chicago Press in 1999. These books are *Youth on Trial* (Thomas Grisso and Robert Schwarz, editors) and *The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court* (Jeffery Fagan and Franklin E. Zimring, editors). The Network also helped support the 1998 publication by Oxford University Press of *American Youth Violence*, by Network member Zimring.

The Network's policy, practice, and dissemination activities include:

1. Examination of the legal, jurisprudential, and social-scientific underpinnings for differentiating between juvenile and adult offenders under the law;
2. Analysis of national and international trends in serious youth crime;
3. Examination of public perceptions of and attitudes about juvenile offending and juvenile justice; and
4. Education of the general public, journalists, practitioners, and policymakers about the nature of juvenile crime and the development of appropriate responses to it.

As the Network continues its critical work into the next millennium, perhaps we can refocus our efforts on better understanding adolescent development in the juvenile justice system in order to prevent new tragedies.

Further information about the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice may be obtained by contacting Laurence Steinberg, Ph.D., Network Director, at lds@vm.temple.edu, and Lynn Daidone Boyter, Network Administrator, at lboyter @earthlink.net.

Patricia E. Lee is Deputy Public Defender, Juvenile Division, City and County of San Francisco, and core member of the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice.

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to Welfare and Institutions Code section 361.5(e)(1). She also claimed that subdivisions (b)(10) and (b)(12) violate her constitutional right to due process because they shift the burden of proof from DHHS to her. The Court of Appeal disagreed with her claims and affirmed the judgment of the juvenile court.

Section 361.5(b)(10) provides that a court may deny reunification services if the parent fails to reunify with a sibling in a different case, causing the sibling to be placed in a permanent plan or where parental rights concerning a sibling are permanently severed and the parent fails to make reasonable efforts to address the problems leading to severance. Here, there was another case in which a sibling of the children involved in this case was placed in a permanent plan of adoption as a result of the mother's failure to reunify with that sibling. There was also evidence that the mother reoffended, which establishes that she failed to make reasonable efforts to cure the problem that led to the siblings' being placed in a permanent plan of adoption. This evidence was found by the Court of Appeal to bring the case within the ambit of section 361.5(b)(10).

The appellate court went on to say that because they found there was enough evidence to bring the case within 361.5(b)(10), it was unnecessary to examine whether it was proper to deny services under 361.5(b)(12).

Section 361.5(e)(1) provides that unless the court determines by clear and convincing evidence that reunification services would be detrimental to the child, an incarcerated parent shall receive such services. The mother claims that since there was no finding of detriment, she is entitled to reunification services. The court found that section 361.5(e) ensures services to an incarcerated parent when there is no finding of detriment and when the disqualifying grounds of 361.5(b) are not present. The court held that this conclusion was based on the fundamental rule of statutory construction that different parts of one statute should be harmonized by considering individual sections within the overall framework of the whole statute. The court held that once the juvenile court found that 361.5(b)(10) applied to the mother, the juvenile court was not required to consider any other statutory reason for providing services.

The mother also attacked the constitutionality of 361.5(b)(10) and (b)(12) for violating the right to due process by shifting the burden of proof from DHHS to her. The mother claimed that once an affirmative finding is made under either of these subdivisions, an impermissible conclusive presumption of inability to parent is created. The court found that, although after an affirmative finding the section directs the court not to order reunification, the court retains discretion to order reunification if it finds by clear and convincing evidence that reunification services would be in the best interest of the child. The statute does not create a conclusive presumption and is thus constitutional.

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Q&A

The Center for Children and the Courts receives from the public and participants of the court system numerous inquiries on various legal topics.

Q. ***Can a retired superior court judge sitting as a juvenile court referee make orders that are not subject to review by the superior court, based on the referee's status as a retired superior court judge?***

A. Our research suggests that unless the referee is expressly acting as a temporary judge by parties' stipulation or by the appointment order, the referee's powers are limited by article VI, section 22 of the California Constitution. Additional or separate status as another type of judicial officer would not alter the status of the referee as a subordinate judicial officer who is performing subordinate judicial tasks subject to review by a superior court judge. Therefore, all laws applicable to juvenile court referees would apply, and the referee's orders would most likely be subject to review. (See *In re Edgar M.* (1975) 14 Cal.3d 727.)

Dependency Case Summaries
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***Christine M. v. Superior Court* (1999) 69 Cal.App.4th 1233 [82 Cal.Rptr.2d 220]. Court of Appeal, Second District, Division 3.**

The juvenile court denied a father's request to stay dependency proceedings. The request was made pursuant to the Soldiers' and Sailors' Civil Relief Act (50 U.S.C. app. § 521). At the time the proceedings began, the father's whereabouts were unknown. The social worker initiated a due diligence search and located and met with the father. At that meeting, the father informed the social worker that he had enlisted in the navy. He also stated that he was unable to care for the child and wished the child to be placed with the paternal aunt and uncle if the mother was unable to care for the child. The paternal aunt and uncle had already adopted the child's sibling. After the father left for his naval training, the court appointed counsel to represent his interests. Almost a year later, father's counsel filed a written request for a stay of the proceedings. The juvenile court found that the father had little to no contact with his attorney, the social worker, the child, or the child's caretaker. The court denied the stay and then terminated reunification services, stating that such services would be useless because he had shown he was an uninterested parent.

The father appealed, claiming that the evidence showed he could not attend parenting classes because of his naval service, and he therefore was entitled to have the proceedings stayed pursuant to the Soldiers' and Sailors' Civil Relief Act. The Court of Appeal disagreed with the father and affirmed the juvenile court's decision. The appellate court found that the act gave servicemen and women relief from litigation during the time of service when the service person's ability to prosecute or defend the case is adversely affected by the fact of their service. The court also found that although doubtful cases must be resolved in favor of the service person, the rights of the civilian litigant must also be considered.

In this case, the appellate court reviewed the juvenile court's findings, which were the basis for denying the requested stay, in order to see if the stay was properly denied. The father's stated lack of desire to parent the child without the mother, combined with his demonstrated lack of interest in visiting the child, were found to be critical in upholding the stay. That no declaration was submitted to explain how the father's military service impeded his compliance with the case plan was also found to be critical. The three factors weighed in favor of upholding the denial of the stay, and without more than a mere assertion of the father's military service, there was nothing to warrant a stay. Granting the stay would only postpone a stable placement for the child. The child's right to a stable placement outweighed the father's unasserted right to parent, and the denial of the stay did not materially affect his right.

***Karen S. v. Superior Court* (1999) 69 Cal.App.4th 1006 [81 Cal.Rptr.2d 858]. Court of Appeal, Third District.**

The juvenile court denied a parent reunification services on the ground that the parent resisted prior treatment for chronic use of drugs and alcohol. The child was removed from the parent when the child was less than one month old. The mother's mental health problems and alcohol abuse resulted in the removal and permanent placement of her five other children. The father had a history of multiple substance abuse and was being treated with methadone. The father admitted that even when he was being treated with methadone and wasn't drinking because he was on Antabuse, he still was smoking marijuana. The parents stipulated to the minor's detention. At the jurisdictional hearing, the court found that the minor suffered or was at substantial risk due to the parents' inability to provide care. The court then denied reunification services for both parents.

In the published portion of the opinion, the appellate court addressed the father's claim that the juvenile court erred in denying him reunification services. The Court of Appeal rejected the father's claim and affirmed the decision of the juvenile court. The appellate court found that the language of resisting treatment in Welfare and Institutions Code section 361.5(b)(12) included active as well as passive treatment. The court found that when a parent attends and participates in treatment but continues to use drugs, he or she is passively resisting the treatment. Here, the father was passively resisting the treatment and therefore was demonstrating that providing him with reunification services would be a fruitless attempt to protect the child.

The court also rejected the father's claim that denying him reunification services was a violation of due process because he was never given the right to benefit from such services and as such was denied his fundamental right to parent the child. The court found that there were many circumstances in which a parent is denied reunification services without ever being offered such services and that here the best interest of the child would be served only by denying the father reunification services.

***In re Salmon Y.* (1999) 69 Cal.App.4th 933 [81 Cal.Rptr.2d 662]. Court of Appeal, Second District, Division 3.**

At a contested dispositional hearing a mother was denied reunification services pursuant to Welfare and Institutions Code section 361.5(b)(4)

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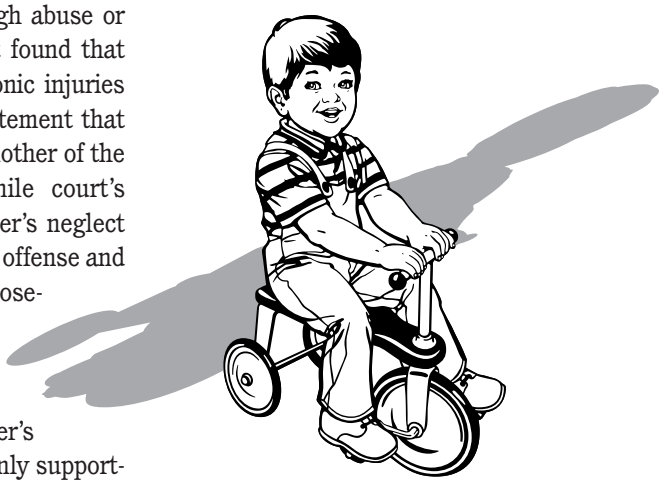
and (6) after the juvenile court found the mother's neglect had contributed to the death of one of her three children. The child's death was found to be a result of severe blows to the abdomen inflicted by the mother's boyfriend. An autopsy of the child also showed that there were other injuries including fractures of a vertebra and an arm, as well as multiple bruises and scars to the face and scalp indicating battered child syndrome. One of the surviving children claimed to have told the mother on numerous occasions that the boyfriend was abusing the children, but said that the mother had done nothing. The juvenile court found that the history of injuries and the statement of the surviving child were enough evidence to find that the mother had placed the children in a dangerous situation and that reunification services were not in the best interest of the children.

The mother appealed, claiming that there was not enough evidence to support the finding that she caused the death of the child within the meaning of section 361.5(b)(4) or that the reunification services would not be in the best interest of the children. The appellate court found clear and convincing evidence, as is required by section 361.5(b)(4), that the mother had caused the death of the child through abuse or neglect. The appellate court found that the evidence of obvious chronic injuries and the surviving child's statement that he repeatedly informed his mother of the abuse supported the juvenile court's determination that the mother's neglect rose to the level of a criminal offense and that she should have been prosecuted with her boyfriend. The appellate court found that if the evidence supported a finding of the mother's criminal negligence, it certainly supported a finding under section 361.5(b)(4).

The appellate court also found substantial evidence to support the juvenile court's determination that reunification services would not be in the best interest of the children. The mother claimed that the juvenile court erroneously relied on her past reckless behavior and not the six factors from section 361.5(h) in order to deny reunification services. The appellate court found that the six factors from subdivision (h) apply only to section 361.5(b)(6), so even if the mother's argument had merit, it would not matter because services were still denied under section 361.5(b)(4). The appellate court found that the mother's argument did not have merit. The court found that the juvenile court had applied the six factors in making their determination under section 361.5(b)(6). The application of these factors was found on the record as is required by 361.5(i). The appellate court affirmed the juvenile court's determination.

In re Casey D. **(1999) 70 Cal.App.4th 38 [82 Cal.Rptr.2d 426]. Court of Appeal, Fourth District, Division 1.**

The juvenile court denied parents' Welfare and Institutions Code section 388 petition. The petition sought custody of the child or, alternatively, a plan of long-term foster care and reinstatement of parental rights. The child was born with a positive toxicology for morphine/heroin. The child was declared a dependent, removed from the parents, and reunification services were ordered, including a drug treatment program. The mother participated in the drug treatment program but had three or four relapses. The father had remained sober since a few months after the child was declared a dependent. At the 6-month review hearing, the court terminated reunification services to the parents and set the matter for a section 366.26 permanency planning hearing. The parents appealed, but the appellate court affirmed the lower court's decision. After the 6-month review hearing, the mother changed treatment programs and responded much better to the new treatment. The father began regular visitation with the child, although the child was not comfortable with the father unless the mother was there.



The parents appealed the denial of their petitions. They claimed that the termination of reunification services at the 6-month review hearing constituted a violation of their due process rights and that the petitions established changed circumstances showing that returning the child or instituting a plan of long-term foster care would be in the child's best interest. They also claimed that parental rights should not have been terminated because a beneficial parent/child relationship existed.

The Court of Appeal found the due process argument did not merit reversal of the juvenile court's order terminating reunification services. The court first found the claim was untimely. The proper time for raising the issue was in the appeal that followed the 6-month review hearing, when the matter was first cognizable. The substance of the argument was that the termination violated the minimum constitutional protections rule because federal provisions provide for at least 12 months of reuni-

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fication services. The court found that the argument failed because it referenced federal statutory law and not constitutional law and no specific federal statute was cited.

The appellate court found that the juvenile court did not abuse its discretion in finding that there were no changed circumstances or that returning the child to the parents' custody or long-term foster care was not in the child's best interest. The appellate court found that the juvenile court was free to accept the social worker's opinion that returning the child to the home was not in the best interest of the child and to reject a program coordinator's opinion that the child could be returned to the mother. The court also found that the mother did not prove changed circumstances but rather only changing circumstances. The court found that although the father had established changed circumstances with his 9 months of sobriety, he did not show that returning the child to his custody would be in the child's best interest. He had not established a parental relationship with the child, and the child did not feel comfortable around the father unless the mother was present.

The appellate court also affirmed the juvenile court's finding that the child should be placed for adoption because the exception to the preference for adoption, that a beneficial parent/child relationship exists, did not exist here. The court found that the relationship that must exist to defeat adoption is a relationship that is so beneficial to the child that it outweighs the benefit the child would gain through adoption. The court found that such a relationship is of the type that generally arises from day-to-day contact with the child. The juvenile court found, and the appellate court affirmed, that the child was not comfortable with the father and that the mother's relationship with the child was analogous to that of a friendly visitor. Such a relationship does not outweigh the benefit and well-being that the child will receive from adoption.

Finally, the court found that the mother improperly raised for the first time on appeal the issue of placement with a relative. The issue should have been raised at the dispositional hearing. The court found, however, that the agency did, in fact, fulfill its obligation in attempting to find a relative who would be suitable and willing to adopt the child.

In re Julie M. **(1999) 69 Cal.App.4th 41 [81 Cal.Rptr.2d 534]. Court of Appeal, Fourth District, Division 3.**

At a 6-month review hearing, the juvenile court amended the mother's visitation plan after finding that although the mother had not progressed, the Orange County Social Services Agency had provided reasonable reunification services. The new visitation plan required the children's consent to visits. The mother has an ongoing history of drug use and assaultive behavior. The mother screamed obscenities at one of the children and physically abused another one. The mother appealed from the order following the 6-month review hearing, claiming that she was not provided with reasonable services and challenging the amended visitation plan requiring the children's consent.

The Court of Appeal found substantial evidence to support the finding that reasonable services had been provided but that the amended visitation plan improperly delegated judicial authority to the children.

The appellate court found that the mother waived her right to any complaints she might have had regarding the initial plan because she did not appeal from the dispositional order. The mother cannot fault the Orange County

Social Services Agency for complying with an order that she did not object to from the start. The appellate court also found that there was evidence showing the Orange County Social Services Agency fostered a personal connection between mother and children despite complicating factors such as the mother's emotional instability. The appellate court found that although these services might not have been perfect, the standard is whether the services were reasonable under the circumstances, and these services were reasonable.

The Court of Appeal did find that the amended visitation was an abuse of discretion on the part of the juvenile court. The appellate court found that giving the children absolute discretion over visitation was an improper abdication of the court's judicial function. Although the children's aversion to being visited by an abusive parent may be a dominant factor in determining or administering visitation, it cannot be the sole factor. The court must, at the very least, give the Orange County Social Services Agency or a therapist a broad outline of the prerequisites for visitation and not delegate complete authority over visitation. These prerequisites may be, for example, in the form of a time, place, or manner restriction. The ultimate discretion over visitation must rest with the courts and no other entity or individual.

The appellate court also found that it was the responsibility of all the parties, including the court, to establish a record for meaningful judicial review.

Delinquency Case Summaries

Cases Current Through April 1, 1999

In re Uriah R. **(1999) 70 Cal.App.4th 1152 [83 Cal.Rptr.2d 314]. Court of Appeal, First District, Division 4.**

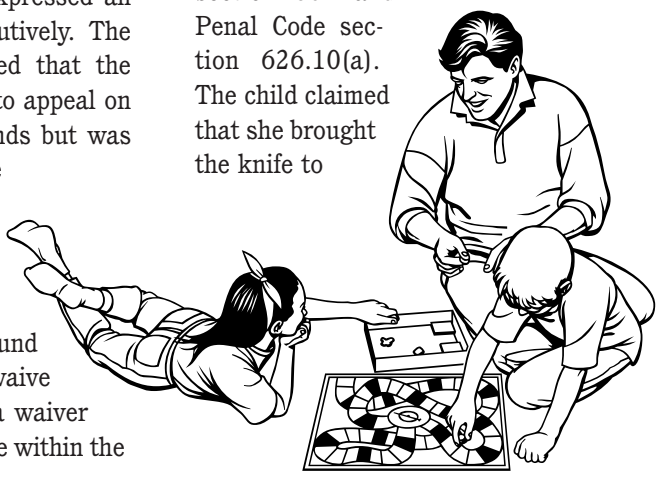
The juvenile court sentenced a child to four years and four months in the California Youth Authority (CYA) after the child pled guilty to an accessory charge as well as unlawful possession of a weapon and of marijuana. Prior to the disposition hearing, the child signed a declaration that stated he gave up his right to appeal and that he was aware that the maximum punishment the court might impose was five years in CYA. The declaration also stated that the court had a number of options available in determining the disposition of the child's case, ranging from home placement to confinement with the CYA. The juvenile court then found that the child had knowingly, intelligently, and voluntarily waived his rights.

The child filed a timely appeal on the following grounds: (1) it was an abuse of discretion to order CYA commitment; (2) "the weapons 'sentence' should have been stayed pursuant to [Penal Code] section 654 pending completion of the term on the accessory charge"; and (3) the maximum period of CYA confinement must be three years, the maximum term for any single count, because the court never expressed an intent to sentence consecutively. The Attorney General responded that the child had waived his right to appeal on the second and third grounds but was entitled to review on the first. The Court of Appeal addressed the issue of the effectiveness and extent of the child's waiver.

The appellate court found that although a child may waive rights to an appeal, such a waiver covers only issues that come within the scope of the waiver. The court rejected the argument that a child could not waive the right to appeal. The court reasoned that because a child, like an adult, may waive certain constitutional rights such as the right to counsel, a child may waive less important statutory rights like the right to appeal. Such a waiver arises in what is in obvious effect a plea bargain. The waiver is limited to issues that are within the scope of the bargain. If the waiver was made without a specified disposition, then the child may appeal unforeseeable and unforeseen subsequent errors. Here, prior to the disposition the child waived his right to appeal. The child did not agree to any specified disposition but merely acknowledged the options available to the court in determining the disposition. The issue of disposition was not a substantial part of the bargain and thus was not exempted from appeal.

In re Tatiana B. **(1999) 70 Cal.App.4th 794 [82 Cal.Rptr.2d 826]. Court of Appeal, Second District, Division 7.**

In a case involving a 12-year-old girl who brought a steak knife to school, the juvenile court declared the child a ward under Welfare and Institutions Code section 602 and Penal Code section 626.10(a). The child claimed that she brought the knife to school after her friends got into a fight with another girl. The other girl had threatened the child and her friends following the fight. The knife was discovered after another student reported the knife to school officials, who then searched the child's backpack. When the child was asked why she had the knife, she stated that it was because other girls had threatened to kill her. The probation report indicated that the child did not have a criminal record, had not told her mother about the threats, and was well behaved at home, and that the misconduct was "a surprise to all." In court, the judge asked the child questions, including some about the event. The child replied that she knew it was against school rules to have a knife on campus. The child also stated that she did not know if the threat was real. At the next appearance after the child admitted the weapon possession allegation in the petition, the juvenile court informed the child of her constitutional rights, which the child then waived. The court then found that the child had intelligently, knowingly, and voluntarily admitted the allegation of the petition and declared her a ward of the court placed on home probation; however, the court found the theoretical maximum period of confinement to be three years. The child appealed, contending (1) the juvenile court failed to inquire into and make an express finding of whether the child appreciated the wrongfulness of her act, and (2) a remand was necessary to determine whether the offense was a misdemeanor or a felony.



The Court of Appeal reversed and remanded as per the child's contentions. First the court reiterated that Penal Code section 26 presumes a child under age 14 is incapable of committing a crime and that the People must prove by clear and convincing evidence that at the time the child committed the offense, she knew the wrongfulness of the act. The juvenile court rejected the

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People's contention that the child's in-court statement that she knew carrying the knife was against school rules was adequate proof of capacity. Instead the appellate court found that, in cases involving children under age 14, the juvenile court "must incorporate into their admission procedures an express, on-the-record inquiry into the minor's appreciation *at the time of the act* of the act's wrongfulness."

The court further found regarding the second issue that, under *In re Manzy W.* (1997) 14 Cal.4th 1199, 1204, the juvenile court must mandatorily declare at disposition whether a "wobbler" is a felony or misdemeanor. The appellate court found that the juvenile court record did not indicate that the court exercised its discretion in making the finding. The court further found that an entry in the minutes that the offense was a felony or the computation of the theoretical maximum period of confinement is not an adequate substitute for the juvenile court's exercising its discretion on the record during oral disposition proceedings.

In re Edwardo V. **(1999) 70 Cal.App.4th 591 [82 Cal.Rptr.2d 765]. Court of Appeal, Fourth District, Division 3.**

The juvenile court found that the child in this case committed first-degree residential burglary. The child broke into a garage attached to a duplex house from which he stole a bicycle. The child claimed on appeal that the garage was not an inhabited dwelling within the meaning of Penal Code section 460 and therefore the act he committed was not a first-degree residential burglary.

The Court of Appeal found that the garage was an inhabited dwelling despite the fact that the only entrance was through an exterior door and the garage was attached to a multiunit dwelling. The appellate court held that not only are the individual units of a multiunit building dwelling houses, but also the multiunit building itself is a dwelling house. The court went on to say that any basement room or garage attached to a dwelling house, "under the same roof with the living quarters, functionally connected to the living quarters and an integral part of the living quarters is part of the inhabited dwelling house." The appellate court held that although the tenants should have expected to encounter residents or guests of the other unit, the child was neither, and the tenants were reasonable to expect protection from unauthorized intrusions into the garage. The Court of Appeal held that the fact that the only entrance to the garage was through an exterior door was irrelevant. The proper focus was on the proximity of the structure to the dwelling because the closer it is the more potential there is for confrontation.

People v. Rangel **(1999) 70 Cal.App.4th 350 [82 Cal.Rptr.2d 589]. Court of Appeal, Fourth District, Division 3.**

After a finding that the defendant was guilty of attempted voluntary manslaughter and assault with a firearm, the court referred the defendant, 17 years old at the time of the crime but 18 at the time of the conviction, to the California Youth Authority (CYA). At a post-trial hearing, prior to referring the defendant to CYA, the court determined that it might impose a seven-year sentence. Upon the basis of this seven-year determination, the court found that Welfare and Institutions Code section 1732.6 would not be a bar to CYA commitment. However, CYA, after reviewing the documents sent over from the courts that erroneously reported that the defendant was convicted of attempted murder and assault with a semiautomatic weapon, determined that the defendant was ineligible for a diagnostic evaluation and CYA commitment pursuant to Welfare and Institutions Code section 1732.6. The trial court, at another hearing, concluded that it would be futile to try to do anything about this, and although the defense counsel objected, they also agreed with the trial court's finding of futility. The trial court then imposed the previously indicated seven-year sentence.

The defendant appealed, claiming that CYA's refusal to do a diagnostic evaluation and the court's refusal to take any further action required a new trial for sentencing. The appellate court did not grant a new sentencing hearing but did remand the case back to the trial court with directions to remand the case to CYA with directions to perform a diagnostic evaluation. The Court of Appeal found that requiring an evaluation for children 16 and older is within the court's discretionary power pursuant to Welfare and Institutions Code section 707.2. (An evaluation is mandatory for children younger than 16, according to the same section.) However, that section will not apply when Welfare and Institutions Code section 1732.6 prohibits commitment to the CYA. Commitment to the CYA is prohibited for children who commit certain types of offenses—such as those found in Penal Code section 667.5 or Penal

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Code section 1192.7(c)—and are sentenced for life incarceration, an indeterminate period to life, or "a determinate period of years such that the maximum number of years of potential confinement when added to the [child's] age would exceed 25 years. . . ." (Welf. & Inst. Code, § 1732.6.) The appellate court held that section 1732.6 was unclear.

While the prosecution agreed that the age of the child to add to the maximum confinement was the age when the crime was committed, there was disagreement about the meaning of maximum period of confinement. The appellate court found that the maximum period of confinement language was not the maximum possible sentence that could be imposed but rather the maximum period of confinement that the court determines it would impose. Therefore, the trial court must, as in this case, calculate an initial indicated sentence and then add that to the child's age at the time of the crime. The court reasoned that this harmonized the language of the statute because it gave the proper significance to the portion of the statute that requires that there be a determinate number of years. If the Legislature wanted the language to mean the maximum possible sentence authorized for the offense, they could have said so and left out the determinate period language. Therefore, the court found that the defendant here could receive an evaluation because his age at the time of the crime, 17, added to the determinate number of years of the maximum period of potential confinement does not exceed 25 years.

***Mardesich v. California Youthful Offender Parole Board* (1999) 69 Cal.App.4th 1361 [82 Cal.Rptr.2d 294]. Court of Appeal, Second District, Division 6.**

The California Youthful Offender Parole Board returned the child to the trial court for commitment to the state prison. The child filed a petition for a writ of administrative mandamus challenging the board's decision. The trial court summarily denied the petition. The child appealed from the trial court's summary denial of the petition for a writ of administrative mandamus.

The Court of Appeal held that it was precluded from providing meaningful review because the trial court did not review the board's decision under the proper standard of review. The trial court must review the board's decision using the independent judgment standard because the administrative proceeding being reviewed affects a vested fundamental right, namely, liberty. The appellate court found that when an administrative decision affects a right that is legitimately acquired or vested and is a fundamental pecuniary or human right, then the individual affected is entitled to full judicial review. In a review of the recent jurisprudence on the topic, the appellate court found that suspension of driver's licenses, matters relating to welfare benefits, and actions affecting employment involve vested fundamental rights and require full judicial review when requested. Here, the right implicated is liberty, and the court held that liberty is at least as vested a fundamental right as the right to drive, receive welfare, or maintain employment. The appellate court held that the trial court wrongfully applied the substantial evidence standard when it should have used the independent judgment standard of review. The case was remanded to the trial court for review under the independent judgment standard.

***In re Justin Michael B.* (1999) 69 Cal.App.4th 879 [81 Cal.Rptr.2d 852]. Court of Appeal, Second District, Division 4.**

The juvenile court found a child to be a ward of the court after the child was arrested for auto burglary and receiving stolen property. The child was a passenger in a vehicle that had been pulled over by the police. The officer noticed three cellular phones with cigarette lighter adapters and owner's manuals from other types of vehicles behind the driver's seat. The driver of the vehicle told the officer that they were coming from Jack-in-the-Box and were on their way home. The officer testified that that did not make sense considering the direction they were driving, the location of the address on the driver's license, and the location of the nearest two Jack-in-the-Box restaurants that the officer knew in the area. The officer testified that all of this made him suspicious; based on that suspicion he placed the two under arrest. The officer also testified that at the time of the arrest he knew that both the driver and passenger were minors and that they were in violation of the local curfew. Although they were not arrested for curfew violations, the officer testified that he

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believed curfew violations were an arrestable offense. After the arrest, the appellant child made statements at the police station admitting to auto burglary and receiving stolen property.

The juvenile court denied the motion to suppress the statements and the items found in the vehicle. The juvenile court found the evidence was properly seized pursuant to a search incident to an arrest of the children for probable cause and because the children were in violation of curfew, which the juvenile court found was an arrestable offense.

The child appealed, claiming the statements made at the police station were illegally seized because there was not probable cause to arrest and the curfew violation did not authorize the police officer to transport the child to the police station for interrogation. The Court of Appeal agreed with the child and reversed the juvenile court's finding of wardship.

The appellate court found that determining if there was probable cause to arrest requires two distinct analytical steps. The court must first determine when the arrest occurred and what the arresting officer actually knew at the time of the arrest. Then the court must determine if what the arresting officer actually knew amounted to probable cause for arrest. Here, the appellate court held that the record contained no facts indicating the arresting officer was aware of anything that would give rise to probable cause to arrest the appellant child. The court reasoned that the child, as a passenger in the vehicle, did nothing and said nothing to give the officer reason to believe that the child had or should have had knowledge of the phones behind the driver's seat, let alone played a role in stealing them. The court found that there were no facts in the record from which the juvenile court could have inferred the child's involvement in the crime or knowledge of the crime. The court found that there was a lack of facts to support probable cause and held that there was no probable cause for the arrest of the child for auto burglary and receiving stolen property.

The Court of Appeal also found that the child's custodial interrogation was not proper as incident to an arrest for curfew violation. The local ordinance that gives rise to the curfew does not have any provision authorizing what an officer may or may not do upon determining that there is a violation of the curfew. Such direction was found to be controlled by statute. Welfare and Institutions Code sections 601, 625, and 626 state that the general rule is that once an officer has determined that there is a violation, the child may be taken in "temporary custody," but then the officer must either release the child to the proper agency for shelter, counseling, or diversion; release the child after giving the child notice to appear before a probation officer; or take the minor to the county probation officer without unreasonable delay. Officers may not select what to do at random, rather they must choose the alternative that least restricts the child's freedom while at the same time considering which alternative is in the best interest of the child and the community. Statute goes on to dictate what a city or county must do if it adopts a resolution that implements Welfare and Institutions Code section 625.5. The locality in question here did not adopt such a resolution, but the statute taken in conjunction with those mentioned above was found to indicate that the Legislature intended to preempt the field on what an officer may do when finding a violation of a local curfew ordinance. Based on the finding of preemption, the appellate court held that taking a child to a police station for curfew violation and conducting a custodial interrogation are not authorized.

In re Jermaine B. **(1999) 69 Cal.App.4th 634 [81 Cal.Rptr.2d 734]. Court of Appeal, Second District, Division 5.**

The juvenile court found that a child had waived his right to juvenile court adjudication by giving the adult court a false age and pleading no contest. The juvenile court committed the child to the California Youth Authority (CYA) after finding the child's no-contest plea in adult court was an admission that he had violated Health and Safety Code section 11351.5, possession for sale of cocaine base. In adult court, the child was charged with possession for sale of cocaine base in violation of Health and Safety Code section 11351.5. The child, who was 16 at the time, gave police a false name and date of birth. If it were true, the false date of birth would have made the child an adult. In adult court, the child then pleaded no contest to the lesser offense of possession for sale of cocaine in violation of Health and Safety

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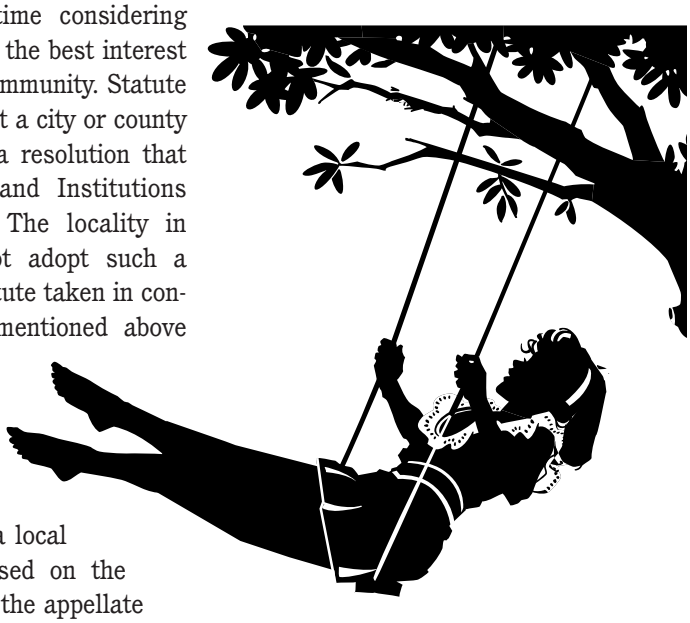

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Code section 11351. The child was never informed of his right to withdraw his plea agreement in the event that the trial court withdrew approval of the agreement. After the plea agreement was entered, the child's real name and age were discovered and the proceedings in adult court were suspended, and the matter was remanded to the juvenile court.

The Court of Appeal found that the child's no-contest plea could not be specifically enforced against the child in juvenile court. The court found that a disposition harsher than that agreed to by the prosecution or the court may not be imposed on the defendant. (*Santobello v. New York* (1971) 404 U.S. 257, 262.) The court found the child committed a more serious offense than the offense the child had pled to in his no-contest plea. The appellate court found that this was a violation of the plea agreement and that the usual remedy for such was to allow the defendant to withdraw his plea. If the defendant is not informed of his right to withdraw his plea, then the defendant does not waive the right to withdraw by failing to object at the time a harsher disposition is imposed. The court found further that the child's counsel did object sufficiently enough to preserve the child's right to raise the issue on appeal.

The Court of Appeal also found that the child did not waive his right to a juvenile adjudication. Although a child who claims to be an adult and is really a minor, and who is tried by a jury in adult court and is found guilty, is not entitled to a new hearing in juvenile court, when the child does not exchange the right to juvenile adjudication for adult jury trial, then the child is still entitled to juvenile adjudication. The appellate court found no authority for subjecting a child to increased penalties in juvenile court after entry of a negotiated plea in adult court. By misrepresenting his age, the child waived his right to specifically enforce the plea bargain but not his right to withdraw the plea and begin fresh in juvenile court.

In a dissenting opinion, one justice found that the protection against objection requirements should not apply to juveniles, especially when the child has acted with such dishonesty as the child did in this case.

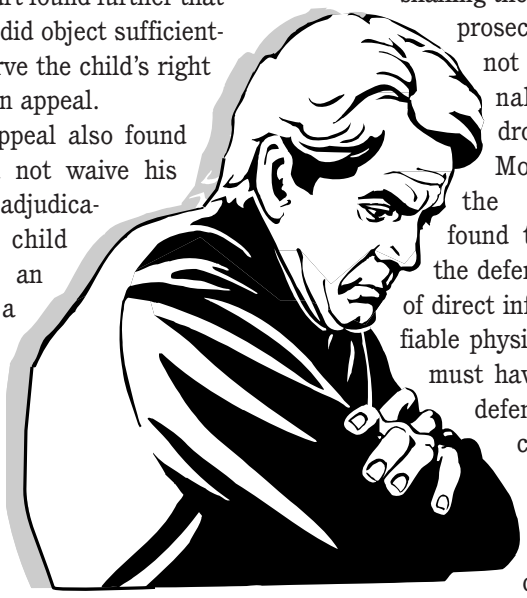
Other Juvenile-Related Case Summaries

Cases Current Through April 1, 1999

***People v. Sargent* (1999) 19 Cal.4th 1206 [970 P.2d 409; 81 Cal.Rptr.2d 835]. Supreme Court of California.**

In the guilt phase of a bifurcated criminal case, the defendant was convicted of felony child abuse (Penal Code section 273a) for severely shaking his child. It was unclear from the verdict whether the defendant was found guilty for direct infliction of unjustifiable physical pain for shaking the infant or for being criminally negligent in dropping the infant. At the sentencing phase of the trial, the enhancement allegations of the statute were found true, and the defendant was sentenced for felony child abuse.

The Court of Appeal found that the defendant must have been convicted of shaking the baby because the prosecution's case was not built upon criminal negligence in dropping the baby. More importantly, the appellate court found that in order for the defendant to be guilty of direct infliction of unjustifiable physical pain, the jury must have found that the defendant was at least criminally negligent. The appellate court found there was no evidence that defendant knew or should have known that great bodily injury or death is likely to result from shaking the baby. The court concluded that the jury could only have found the defendant possessed a general criminal intent to shake his baby with no actual or constructive knowledge of the consequences and that this was not enough for a felony conviction under the statute.



The Attorney General appealed and the California Supreme Court granted review. The court found that when a defendant directly inflicts physical pain or mental suffering upon a child, the scienter requirement is general criminal intent. The court first parsed Penal Code section 273a(1), finding that it proscribes four separate branches of conduct. The first determination that must be made is which of the four branches of proscribed conduct is implicated. The court found the proscribed conduct implicated was direct infliction of unjustifiable physical pain or mental suffering. The other remaining branches of proscribed conduct involve indirect abuse or child endangerment, which in a footnote the court stated that it chose not to address. The court found that it had not previously addressed the issue of appropriate mens rea for direct infliction of abuse cases. The court distinguished this case from cases involving indirect abuse or endangerment, such as when a parent declines to seek neces-

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sary medical treatment for a child. (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 135.) There the court found that the statute requires criminal negligence. The court found that when the proscribed act implicated is direct infliction of abuse, the circumstances are different. The court, in reviewing the history of the statute, found no Court of Appeal case besides this one that discusses mens rea for direct infliction of abuse or indicates that there is a requirement of criminal negligence. The only cases that discuss and require criminal negligence are those that involve indirect abuse or endangerment.

The court then found that the appropriate mens rea for child abuse when directly inflicted is general criminal intent. The court first found that the statute was most easily interpreted as requiring only general criminal intent because it proscribes an act without mention of intent to do something further. The court next looked at the similarity between this statute and Penal Code section 273d, corporal punishment. The court found that (1) the two statutes are related, (2) corporal punishment is a general intent statute, and (3) battery, a lesser included offense of corporal punishment, is a general intent statute.

The court found next that the mens rea element applies only to the proscribed act and not to the requirement that the act occur under circumstances that are likely to produce great bodily harm or injury. The court found that the statute does not require that the defendant have actual or constructive knowledge of the circumstances. The court reasoned that this is similar to the difference between theft and grand theft. A thief's culpability is based on the value of the object that he or she is stealing, regardless of whether or not the thief knows the value of the object. Here, the defendant is culpable of a felony if he is found by the jury to have shaken the infant under circumstances likely to produce great bodily injury, whether he was aware of those circumstances or not. Finally, the court found that the "unjustifiably" language saves the statute from being one of strict liability.

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